No. 11,798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PUEBLO TRADING CO. (a corporation), *Appellant,*

vs.

EL CAMINO IRRIGATION DISTRICT (a public corporation); B. A. OSBORN, S. E. AYER, J. P. BURTON, WALTER MAYES and WALTER BUNTING, Members of the Board of Supervisors of Tehama County, and W. E. ROCHFORD, Assessor of Tehama County, California, *Appellees.*

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing a contempt proceeding against appellees B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, as members of the Board of Supervisors of Tehama County, California, and against appellee W. E. Rochford, as Assessor of Tehama County.

Appellant Pueblo Trading Company is the holder of $53,000.00 par value of interest bearing bonds out of a total of $423,000.00 par value of interest bearing bonds issued by appellee El Camino Irrigation District. Appellant commenced an action against the irrigation district in the Court below for a money judgment for the amount of principal and interest owing and unpaid on the bonds held by appellant (R. 2-5). The irrigation district failed to make an appearance in the action and appellant recovered a judgment *by default* against the district wherein it was ordered that, upon the failure or refusal of the irrigation district and its officers to make provision for payment of the default judgment, the board of supervisors and other officers of Tehama County should make provision for payment of the same by levying and collecting assessments against the lands in the district in the manner provided by Division 11 of the Water Code of the State of California.[1] (R. 7.) *This part of the default judgment went beyond the complaint and exceeded the prayer which was for a money judgment and for general relief.* (R. 5.)

Copies of the default judgment were served upon all of the appellees herein, except Walter Bunting who was not a member of the board of supervisors at the time service was made. (R. 9-11.) Thereafter, by a written notice and demand, appellant notified the board of supervisors that the irrigation district had

[1]Sections 26500 to 26504, inclusive, of the Water Code provide for the levying of assessments by the county in cases where the irrigation district fails to make the required levy. They are set forth in the appendix to this brief.

failed to levy any assessment, or to take any other action, for the purpose of satisfying the default judgment; demanded that the board of supervisors forthwith levy such assessment; and advised the board of supervisors that if it failed to make such levy, application would be made to the Court for an order citing the board of supervisors for contempt of Court for failing to carry out the provisions of the default judgment. (R. 24.)

For reasons which will be discussed later, the board of supervisors did not make the levy demanded by appellant. Whereupon the Court below, upon application by affidavit (R. 14-16) filed on behalf of appellant, issued its order directing appellees B. A. Osborn, S. E. Ayer, J. P. Burton, Walter Mayes and Walter Bunting, members of the board of supervisors, and appellee, W. E. Rochford, county assessor, to show cause before the Court why they and each of them should not be punished for contempt for disobedience of the default judgment and why such further order in the premises should not be made as would insure the levy and collection of assessments for the satisfaction of the default judgment. (R. 12.) *None of these appellees had been made a party to the action, or had made a voluntary appearance therein, or, prior to the issuance of this order, had been brought before the Court by any process whatsoever.*

The members of the board of supervisors and the county assessor demurred to appellant's affidavit for order to show cause, on the grounds: (1) that that part of the default judgment upon which the order

was based went beyond the complaint and was therefore ineffective; (2) that none of these appellees had been made a party to the action or had been brought before the Court by any process whatsoever; and (3) that it did not appear from the affidavit that appellant had pursued the remedies provided to it by Sections 26550 to 26553, inclusive, of the Water Code of the State of California.[2] (R. 18.) An affidavit in opposition to the order to show cause was filed on behalf of the members of the board of supervisors and the county assessor in which it was shown that the failure of these appellees to levy the assessment was not prompted by any lack of respect for the Court, but was due solely to the desire of these appellees to have their day in Court. (R. 19, 20.) The position taken by these appellees was supported by a written opinion of the Attorney General of the State of California. (R. 21-23.)

The matter came on for hearing and the Court below dismissed the contempt proceeding. (R. 27-29.)

ARGUMENT.

1. THAT PART OF THE DEFAULT JUDGMENT IS VOID WHICH ORDERS THE BOARD OF SUPERVISORS AND OTHER OFFICERS OF TEHAMA COUNTY TO MAKE PROVISION FOR PAYMENT OF THE MONEY JUDGMENT.

The judgment recovered by appellant, and upon which the contempt proceeding is based, was a judg-

[2]These sections of the Water Code are set forth in the appendix hereto.

ment *by default.* Appellee irrigation district, the defendant below and only other party to the action, did not make an appearance. The prayer of appellant's complaint was for a money judgment "and for such other relief as may be proper". (R. 5.) The relief granted by the Court below exceeded the relief specifically prayed for in the complaint, by ordering the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment against appellee irrigation district through the levy and collection of assessments against lands in the district. (R. 7.)

Because this was a judgment *by default,* the only relief which the Court below had power to grant was the relief specifically prayed for in the complaint, i. e., a money judgment for the principal and interest owing and unpaid on the bonds. Code of Civil Procedure of the State of California, Section 580.[3] This rule is stated by the California Supreme Court, in the case of *Metropolitan Life Insurance Company v. Welch,* 202 Cal. 312, at 314, 315, 260 Pac. 545, as follows:

> "In an action wherein the judgment is entered by reason of the failure of the defendant to appear and answer the complaint therein, the relief granted cannot exceed that which is demanded in the complaint (Code Civ. Proc., sec. 580 * * *)."

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[3]This section provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In an earlier case, *Lang v. Lang,* 182 Cal. 765, at 769, 190 Pac. 181, the same Court said:

> "* * * it is a well-established rule that in a default case the relief granted cannot exceed the prayer."

The prayer for general relief did not enlarge the power of the Court so as to enable it to grant the additional relief ordering the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment. As stated in the *Metropolitan Life Insurance Company* case, 202 Cal. 312, at 315, 260 Pac. 545:

> "Where there is no answer the prayer for general relief cannot enlarge the power of the court to grant relief not specifically prayed for."

And in the case of *Peters v. Peters,* 16 Cal. App. (2d) 383, 385, 60 Pac. (2d) 313, the Court said:

> "It has been held also that the general language of a prayer such as 'for any further relief', etc., adds nothing to the prayer of the complaint when a default judgment is entered thereon". (Citing the *Metropolitan Life Insurance Company* case and other California decisions.)

See also the case of *American Securities Company v. van Loben Sels,* 13 Cal. App. (2d) 265, at 269, 56 Pac. (2d) 1247, where the Court said:

> "Defendants rely upon a legal principle which is beyond dispute. Where, as here, judgment is taken by default, no relief can be granted in excess of that prayed for. Even though the allegations of the complaint would support a judgment

> for additional relief, *and general relief is asked for,* the judgment cannot exceed the specific prayer of the complaint." (Italics ours.)

The default judgment, insofar as it orders the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment, is void. This is shown by the following statement in the *Lang* case, 182 Cal. 765, at 769, 190 Pac. 181, where the California Supreme Court, after stating the rule that in a default case the relief cannot exceed the prayer, said:

> "And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided under the doctrine that it is not *res judicata.*"

This statement was later quoted with approval in the *Metropolitan Life Insurance Company* case, 202 Cal. 312, at 315, 260 Pac. 545.

Having been void when rendered, this part of the judgment will always remain void. *Pennoyer v. Neff,* 95 U. S. 714, 728, 24 L. ed. 565, 570. The Court could, of its own motion or upon having its attention called to the invalidity, make an order striking such part from the judgment. *Balaam v. Perazzo,* 211 Cal. 375, 380, 295 Pac. 330.

The Court is here dealing with a state-created right and the only basis for federal jurisdiction is the diversity of citizenship between the parties. Under the rule of *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, the validity of

the judgment is to be determined by the law of California. The rule of the *Erie Railroad Company* case[3a] was applied by the United States Supreme Court in the case of *Guaranty Trust Company v. York,* 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, which involved the question whether in a diversity case a federal Court in equity could grant relief, when no recovery could be had in the state Courts because the action was barred by a state statute of limitations. The opinion of the Court was delivered by Mr. Justice Frankfurter, who said (326 U. S. at 109, 110, 89 L. ed. at 2086, 2087):

> "The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof [citing authorities], as to conflict of laws [citing authorities], as to contributory negligence [citing authorities]. Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.

[3a]See *King v. United Commercial Travelers,* ..... U.S. ....., 92 L. ed. 479, 482, ... S. Ct. ....., for the latest pronouncement of this rule.

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."

Turning now to California law, it has been shown that in a suit brought in a state Court, Section 580 of the Code of Civil Procedure would completely bar that part of the default judgment which orders the board of supervisors and other officers of Tehama County to levy the assessment. The decision in the *Guaranty Trust Company* case holds, we submit, that the federal Courts should follow the state law in this matter.

It appears that the same result should be reached through the application of Rule 54(c) of the Federal Rules of Civil Procedure[4] which provides:

> "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

This indicates that in cases where a judgment is taken *by default,* the prevailing party is *not* entitled to relief which is not specifically prayed for in the complaint.

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[4]28 U.S.C.A., following Section 723c.

2. THE COURT BELOW DID NOT HAVE JURISDICTION OVER THE BOARD OF SUPERVISORS OR THE COUNTY ASSESSOR WHEN IT ISSUED ITS ORDER CITING THEM FOR CONTEMPT.

It is fundamental that the board of supervisors and the county assessor were not bound by the default judgment, which was a judgment *in personam,* unless the Court below had jurisdiction over them. *Pennoyer v. Neff,* 95 U.S. 714, 724, 24 L. ed. 565, 569; *Buss v. Prudential Ins. Co. of America,* 126 Fed. (2d) 960, 966; Code of Civil Procedure of the State of California, Section 1917;[5] *Donegan v. City of Los Angeles,* 109 Cal. App. 673, 681, 293 Pac. 912. Such jurisdiction could have been acquired only by the lawful service of process upon them or by their voluntary appearance. *Pennoyer v. Neff,* 95 U.S. 714, 724, 725, 24 L. ed. 565, 569, *Hawkins v. Abbott,* 40 Cal. 639, 640.

The members of the board of supervisors and the county assessor were not parties to the action and none of them made a voluntary appearance or was brought before the Court by any process whatsoever prior to the issuance of the order citing them for contempt. It is true that they were served with copies of the default judgment and that appellant served the board of supervisors with a written notice and demand. This, however, was not such service of process or notice as will satisfy the jurisdictional requirement; they were

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[5]This section reads as follows: "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

entitled to have such notice as would have enabled them to appear in Court and be heard on matters relating to performance by them, prior to rendition of the judgment purporting to bind them. As stated by the United States Supreme Court in the case of *Toland v. Sprague,* 12 Peters 300, at 329, 9 L. ed. 1093, at 1105:

> "Nothing can be more unjust than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him by which he will have notice, which will enable him to appear and defend himself."

Stated another way, the general rule is that "no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." *Mallow v. Hinde,* 12 Wheaton 193, 198, 6 L. ed. 599, 600; *Buss v. Prudential Ins. Co. of America,* 126 Fed. (2d) 960, 966.

It follows that the Court below did not have jurisdiction over the board of supervisors or the county assessor, either when it pronounced the default judgment or when it issued the order citing them for contempt. Jurisdiction having been taken over these appellees when they had not been served with process, that part of the judgment which purports to bind them is void. This is made clear by the following statement by the United States Supreme Court in the case of *The Lessee of Walden v. Craig's Heirs et al.,* 14 Peters 147, at 154, 10 L. ed. 393, 397:

"It is admitted that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void."

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3. DISOBEDIENCE OF A VOID JUDGMENT, OR ONE ISSUED BY THE COURT WITHOUT HAVING JURISDICTION OF THE PARTIES TO BE BOUND, IS NOT CONTEMPT.

It has previously been shown in the argument that the Court below did not have authority to grant the additional relief ordering the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment. Under controlling law this part of the judgment is void because it exceeds the relief specifically prayed for in the complaint and the judgment in this action was taken by default. It has also been shown that this part of the judgment is void for the further reason that the Court did not have jurisdiction over the board of supervisors or the county assessor when the judgment was rendered.

It is a well established rule that disobedience of a void judgment, or one issued by the Court without having jurisdiction over the parties to be bound, is not contempt. This Court had occasion to state this rule in its opinion in the case of *Beauchamp v. United States,* 76 Fed. (2d) 663, 668. It follows, as a corollary to this rule, that if the Court below had issued an order punishing the members of the board of super-

visors or the county assessor for contempt, that order would have been equally void. *Ex parte Fisk,* 113 U.S. 713, 718, 28 L. ed. 1117, 1119, 5 S. Ct. 724; *Ex parte Ayers,* 123 U.S. 443, 485, 31 L. ed. 216, 223, 8 S. Ct. 164; *Beauchamp v. United States,* 76 Fed. (2d) 663, 668. Clearly, the Court below did not commit error by dismissing the contempt proceeding.

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4. **RELIEF BY MANDAMUS SHOULD NOT BE GRANTED EXCEPT AS A MATTER OF SOUND JUDICIAL DISCRETION AFTER A CAREFUL CONSIDERATION OF ALL OF THE MATERIAL FACTS.**

The default judgment, insofar as it orders the board of supervisors and other officers of Tehama County to make provision for payment of the money judgment, grants relief in the nature of mandamus. Although writs of mandamus were abolished by Rule 81(b) of the Federal Rules of Civil Procedure, the remedy still is available and is governed by the same principles as formerly applied. Federal Rules of Civil Procedure, Rule 81(b),[6] 28 U.S.C.A., following Section 723c; *Hammond v. Hull,* 131 Fed. (2d) 23, 25 (certiorari denied, 318 U.S. 777, 87 L. ed. 1145, 63 S. Ct. 830.)

It is well established that relief by mandamus is not granted as a matter of right, but only as a matter of sound judicial discretion. This presupposes a care-

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[6]This rule is as follows: "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

ful consideration of all of the material facts by the Court. A clear expression of this rule is found in the case of *Duncan Townsite Company v. Lane,* 245 U.S. 308, at 311, 312, 62 L. ed. 309, at 311, 38 S. Ct. 99, where Mr. Justice Brandeis said:

> "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief, or will be within the strict letter of the law, but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles."

For another and later statement of the rule see the case of *United States v. Dern,* 289 U.S. 352, at 359, 360, 77 L. ed. 1250, 53 S. Ct. 614, at 617, where Mr. Justice Stone said:

> "Although the remedy by mandamus is at law, its allowance is controlled by equitable principles [citing cases]; and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right.
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> * * * * * * *
>
> "The Court, in its discretion, may refuse mandamus to compel the doing of an idle act, [citing cases] or to give a remedy which would work a public injury or embarrassment [citing cases]

> just as, in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest."

This is also the rule in California. *El Camino Land Corporation v. Board of Supervisors of Tehama County,* 43 Cal. App. (2d) 351, 354, 355, 110 Pac. (2d) 1076; *Clough v. Baber*, 38 Cal. App. (2d) 50, 53, 100 Pac. (2d) 519.

Applying this rule to the cause now before this Court, what were the material facts which the Court below should have considered before ordering the board of supervisors and other officers of Tehama County to levy an assessment? This very matter, involving the same bond issue of appellee irrigation district, was before the state Courts in 1941, in the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County,* 43 Cal. App. (2d) 351, 110 Pac. (2d) 1076. In that case a bondholder sought a writ of mandamus to compel the Board of Supervisors of Tehama County (the present members of which are appellees herein) to levy an assessment upon all assessable lands within appellee irrigation district in an amount sufficient to retire the matured and outstanding bonds of the district. The Superior Court of Tehama County refused to issue the writ and the District Court of Appeal for the Third Appellate District affirmed the lower Court's decision. A petition for hearing was denied by the State Supreme Court.

In arriving at its decision the Superior Court found facts showing that it was the legal duty of the board of supervisors to levy the assessment, but it also found additional facts of an equitable nature which precluded the issuance of the writ. These latter findings are somewhat lengthy and we quote them here only because of their materiality to the cause now before this Court. The same irrigation district, the same bond issue and the same board of supervisors are involved. In a sense the decision in the *El Camino Land Corporation* case establishes the law of the case. The findings are as follows (43 Cal. App. (2d) at 352-354):

> "It is true that in taking into account said bond issue and the interest accumulations thereon and the obligations of the land in said district to the holders of said securities by reason of said indebtedness that the reasonable market value of the land which would be required to bear the burden of a one hundred twenty-eight and twenty-six/100 dollar ($128.26) assessment per acre is as follows: Twenty-five per cent (25%) of the land within said El Camino Irrigation District has a value of twenty-five dollars ($25.00) per acre; ten per cent (10%) of the land within said District has a value of sixty dollars ($60.00) per acre; and approximately sixty-five per cent (65%) of the land within said district has a value of twenty dollars ($20.00 per acre, there being a nominal area thereof immediately adjacent to the California State Highway, a portion of which has a probable value for industrial purposes.
>
> "It is true that there are seven thousand five hundred forty-six (7,546) acres of land situated

within the exterior boundaries of the El Camino Irrigation District and that said District has acquired and is now the owner of all of said land except two thousand sixty-two and forty-eight/100 (2,062.48) acres thereof, and that the assessment sought to be levied by petitioner herein would require a levy on each acre of land left in private ownership and not held by the district in the sum of one hundred twenty-eight and twenty-six/100 dollars ($128.26).

"It is true that the revenues derived from the operation of the lands within said El Camino Irrigation District are wholly insufficient to pay said sum of one hundred twenty-eight and twenty-six/100 dollars ($128.26) per acre and that no part or portion of the lands within said District is able to bear the burden of such an assessment; and that a levy of one hundred twenty-eight and twenty-six/100 dollars ($128.26) per acre as requested and demanded by petitioner herein would yield no funds for the payment of bond interest and bond principal but would throw the affairs of said district into a more complicated state of chaos and confusion and would be fatal to the landholders in said district and said landholders owning lands would lose title thereto for nonpayment of assessments without benefit to the bondholders or holders of matured interest coupons.

"It is true that it is not within the ability of the lands within the said district, the title to which is now vested in private ownership, to pay an assessment in excess of those heretofore levied by the Board of Directors of the El Camino Irrigation District and that to levy a rate in excess

of those heretofore levied by the Board of Directors of the El Camino Irrigation District would be detrimental to the bondholders and landholders alike and would tend to and would destroy to a marked degree the possibility of securing revenue for the bondholders of the El Camino Irrigation District.

"It is true that to levy the assessment prayed for by petitioner would create a burden upon the lands situated within the El Camino Irrigation District so great and excessive that it would be neither practical nor possible for the landholders therein to pay the same and would yield no revenue to said district for the purpose of paying bond principal or bond interest and destroy its present meager ability to pay the cost of maintenance and operation of said district and thereby promote a collapse of the powers of said district to raise any sum by assessments upon the lands still remaining in private ownership causing said district to cease to function for lack of sufficient funds, destroying the security of creditors of said district and confiscating the equities of the landholders therein; and would result in gross inequities and serious damage; that the writ prayed for, if granted, would lead to chaos and confusion and would accomplish no useful purpose to the petitioner but only tend to destroy the district's ability to yield revenue to petitioner and lead to inequities detrimental to all parties and result in a public mischief and destroy the spirit of equity and said district could not discharge its trusts.

"It is true that at the time of the filing of petitioner's petition herein and for a long time prior thereto the El Camino Irrigation District, in fact,

was insolvent and/or unable to pay its obligations in full as they matured and that it has no funds or source from which to obtain funds with which to pay its obligations,—past, present or future,—in full, or in an amount comparable to the obligations due.

"It is true that an assessment as required by petitioner would exceed the actual reasonable value of the lands upon which it would be levied from two to five times; and that it would be impractical and unreasonable to expect any material return therefrom, and the court finds it would result in no advantage to petitioner but would result only in disadvantages and impairment of equities of petitioner and intervenors and the El Camino Irrigation District."

Commenting now upon the above findings, it is obvious that the assessable lands in the district would have been unable to bear such a burden and that ultimately they would have been sold to the district for nonpayment of the assessment. In theory the power to tax is inexhaustible, but in practice this power may become, and often does become, ineffectual. As lands are sold to the district for nonpayment of the assessment, the burden is pyramided upon the remaining lands within the district until all of the assessable lands are sold to and owned by the district. The result is that no money is collected by the assessment, there are no longer any lands subject to assessment in the district, and these lands, now owned by the district, are removed from the county tax roll. This places an additional tax burden upon the other lands in the

county and the economic disaster continues apace, but on a county-wide scale. It was considerations such as these which prompted the state Courts to deny the remedy of mandamus in the *El Camino Land Corporation* case.

The failure, then, of the board of supervisors to levy the assessment was not due to any lack of regard for the Court. The decision in the *El Camino Land Corporation* case, which involved the district's ability to pay the necessary assessment, had held that such a levy would result in gross inequities and serious public injury and would accomplish no useful purpose. Although the default judgment in our case limited the levy to an amount sufficient to retire the bonds held by appellant, the board of supervisors would have been required by law to levy assessments in a total amount sufficient to retire all of the outstanding bonds of the district. Water Code of the State of California, Section 25650, subsection (b)[7]. As stated in the case of *Selby v. Oakdale Irrigation District,* 140 Cal. App. 171, at 177, 178, 35 Pac. (2d) 125:

> "We have read all the acts of the legislature beginning with the act of 1897, down to and including the acts of the legislature of 1933, and fail to find a single clause, sentence or word giving to, or indicating that the board of directors of an irrigation district is invested with any power or authority to discriminate between bondholders in levying taxes for the payment either of

[7]This section is set out in the appendix hereto.

> principal or interest; nor has our attention been called to any such provision in the various statutes. * * * The authorities cited and properly analyzed support the conclusion that when the statute under which the tax-levying board has acted, prescribes what shall be done, and grants the power to act in a particular manner, all actions different therefrom dependent simply upon the whim, wish or determination of the tax-levying body are *ultra vires,* and the act taken can only stand in so far as it complies with the express authority given and provided for by law."

The lack of power or authority to discriminate between bondholders in levying assessments for the payment of principal or interest applies equally to the board of supervisors, inasmuch as assessments levied by this body are to be levied in the same manner and with the same effect as if levied by the board of the irrigation district. Water Code of the State of California, Section 26500.[8] It is understandable that with these considerations in mind the members of the board of supervisors should desire an opportunity to present the material facts to the Court before being required to proceed with the levy.

Appellant states, on page 31 of its brief, that if the Court below was correct in dismissing the contempt proceeding it should have construed the order to show cause as a proceeding under Rule 81(b) of the Federal Rules of Civil Procedure[9] and have proceeded *to require* the levy of an assessment. Appellant is here con-

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[8]This section is set out in the appendix hereto.

[9]See footnote 6 supra.

tending that relief by mandamus should be granted to it as a matter of right. This, as we have seen, is not the law. Appellant is also contending that an assessment should be levied for the sole purpose of retiring the bonds held by it. As has been shown, such a levy is beyond the power of the board of supervisors.

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5. **THE CASE OF BOARD OF SUPERVISORS OF RIVERSIDE COUNTY v. THOMPSON, 122 FED. 860, IS DISTINGUISHABLE FROM OUR CASE.**

In the case of *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860, a bondholder, in a previous action against the Perris Irrigation District, had recovered a money judgment on certain coupons attached to bonds issued by that irrigation district. That judgment was not taken by default, inasmuch as the case went to trial (122 Fed. at 860). It does not appear from the report of the *Thompson* case that the judgment ordered the Board of Supervisors of Riverside County to do anything in the premises.

Thereafter, the judgment creditor petitioned the Court for a writ of mandate requiring the board of supervisors to levy an assessment against the lands in the irrigation district in an amount sufficient to pay the money judgment. An alternative writ was issued and in response thereto the board of supervisors and the irrigation district moved to quash the writ and also interposed demurrers to the petition. The motions to quash and the demurrers were overruled by

the Court which thereupon ordered a peremptory writ of mandamus to be issued.[10] Certain taxpayers of the district were then permitted to intervene, the order for the issuance of the peremptory writ was set aside, and answers were filed to the petition of the judgment creditor. The Court in this proceeding rendered judgment directing the issuance of the peremptory writ, which judgment was affirmed, upon appeal, in the *Thompson* case.

In distinguishing the *Thompson* case from our case, the Court below said:

> "There [*Thompson* case] a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense." (R. 28.)

Appellant argues at length in its brief that the Court below misconstrued the decision in the *Thompson* case, in that the proceeding for a writ of mandate against the board of supervisors in that case was not a second action but merely a supplemental proceeding in aid of execution, and that the members of the board of supervisors were not made parties to any *suit* (Applt's. Br. 22-27). In our opinion this distinc-

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[10]*Thompson v. Perris Irrigation District,* 116 Fed. 769.

tion in nomenclature, if correct, is unimportant. What is important is the fact that in the *Thompson* case the members of the board of supervisors were in Court and were afforded an opportunity to be heard, before the Court rendered its judgment directing the issuance of the peremptory writ which ordered the levy of an assessment. The alternate writ was the process by which the board of supervisors was brought before the Court. As stated in the related case of *Thompson v. Perris Irrigation District,* 116 Fed. 769, at 770, *the writ was process essential to jurisdiction.*

In the cause now before this Court, the Court below did not have jurisdiction over the Board of Supervisors of Tehama County or the Assessor of Tehama County when it entered the default judgment ordering them to levy the assessment. Nor did it have jurisdiction over them when it issued its order citing them for contempt. At no time prior to the day when they appeared in Court to answer the citation for contempt, were they brought before the Court or afforded an opportunity to present any of the material facts to the Court. *The lawful process, which is essential to jurisdiction, is lacking in our case.* There is the further difference that in our case the mandate, ordering the board of supervisors and other officers of Tehama County to levy the assessment, was contained in a default judgment and was void because it exceeded the relief specifically prayed for in the complaint.

We agree with the Court below that the *Thompson* case clearly is distinguishable from our case.

6. REPLY TO CERTAIN OTHER ARGUMENTS IN APPELLANT'S BRIEF.

(a) Argument that it was not necessary for appellant to seek the remedy provided in Sections 26550-26553, inclusive, of the Water Code of the State of California. (Applt's. Br. 10-13.)

Section 26553 of the Water Code[11] provides a remedy for the enforcement of the levying and collection of assessments. Pursuant to this section appellant should have made a complaint to the Attorney General of the State of California. Until appellant has exhausted its legal remedies, it is not entitled to relief by mandamus. *City of San Diego v. Andrews*, 195 Cal. 111, 120, 231 Pac. 736; *McMurtrey v. Clark,* 157 Fed. (2d) 703, 704. The case of *Selby v. Oakdale Irrigation District,* 140 Cal. App. 171, 35 Pac. (2d) 125, cited and quoted from by appellant, does not hold to the contrary.

(b) Charge that the irrigation district has made no attempt to try to work out a solution to its financial difficulties. (Applt's. Br. 14.)

Appellant makes this charge and then admits that the matter is outside the purview of the present proceeding. The charge having been made, appellee irrigation district takes this opportunity to deny it as unfounded.

(c) Argument that the board of supervisors and the county assessor were not necessary parties to the action. (Applt's. Br. 16-27.)

None of the members of the board of supervisors, or the county assessor, contends that he was a necessary

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[11]This section is set out in the appendix hereto.

party to the action for the money judgment. These appellees do contend, however, for reasons which appear earlier in the argument, that they are not bound by that part of the default judgment which orders them to levy an assessment and that they are entitled to notice and an opportunity to be heard in the matter before being required by the Court to proceed with a levy.

(d) Argument that the board of supervisors and the county assessor were afforded due process. (Applt's. Br. 27-29.)

It has been shown that the members of the board of supervisors and the county assessor were cited for contempt for disobedience of a void portion of a judgment, by a court which did not have jurisdiction over them. This, we submit, is not due process. The proceeding, by which the board of supervisors and the county assessor were brought before the Court, was highly irregular and it must follow that the dismissal of such a proceeding is not error.

(e) Statement that the board of supervisors and the county assessor were not entitled to their day in Court. (Applt's. Br. 29.)

Appellant makes this statement and cites the *Thompson* case, 122 Fed. 860, as authority. In the *Thompson* case the members of the board of supervisors had their day in court. There is nothing in that case which supports such a statement.

CONCLUSION.

It has been shown in the argument that that part of the default judgment is void which orders the board of supervisors and the county assessor to make provision for payment of the money judgment recovered by appellant against the irrigation district. It is void for two reasons: first, it exceeded the relief specifically prayed for in the complaint and the judgment was taken by default; and second, it was a judgment *in personam* and the Court did not have jurisdiction over the members of the board of supervisors or the county assessor when the judgment was rendered. Disobedience of that part of the judgment was not contempt, again for two reasons: first, that part of the judgment was void; and second, the Court did not have jurisdiction over the members of the board of supervisors or the county assessor, the parties to be bound. It is respectfully submitted that the Court below did not err in dismissing the contempt proceeding.

The members of the board of supervisors and the county assessor respectfully request that the Court do not make any order requiring them to levy an assessment pursuant to the applicable provisions of the Water Code of the State of California, unless the Court has first afforded them an opportunity to pre-

sent the material facts regarding the levy and has carefully considered those facts.

Dated, Sacramento, California,
April 8, 1948.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

Water Code:

25650. Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:

(a) Interest due or that will become due on all outstanding bonds of the district and interest which the board believes will become due on district bonds authorized but not sold, all respectively before the close of the next ensuing calendar year.

(b) Principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year.

To the extent that provision is otherwise made as permitted by law for the payment of bond principal and interest, levies for principal and interest pursuant to this section need not be made.

26500. If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the

basis of assessment for the district when its assessments are levied pursuant to this article.

26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as is provided to be given by a district secretary when a board is to meet to equalize assessments.

26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

26550. The district attorney of each office county shall ascertain each year whether the duties relating to the levying and collection of assessments in districts have been performed or not, and if he learns

that the board or any official of any district has neglected or refused to perform any of these duties, he shall notify the board of supervisors or the county official required to perform the duty in the circumstances.

26551. Unless the board of supervisors or county official proceeds to perform the duties he has been notified to perform within 30 days after the receipt of notice, the district attorney shall take action in court to compel performance.

26552. The district attorney shall give notice to other officials and take any action necessary to secure the performance in their proper sequence of subsequent duties relating to the levying and collection of assessments.

26553. For the enforcement of the levying and collection of any assessment required to be levied and collected for the payment of any debt incurred, when complaint is made to the Attorney General that the district attorney of any county has not performed any duty devolving upon him by the provisions of this article or is not proceeding with due diligence or in the proper manner in the performance of the duty, the Attorney General shall make an investigation. If he finds the charge to be true, the Attorney General shall take any action necessary to enforce the performance of the duties relating to the levying and collection of assessments.